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U.S. Supreme Court: The 1987-88 Term (Part II)

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THE UNITED STATES SUPREME COURT: THE 1987-1988 TERM (PART II)

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This is the second of two articles reviewing this Term's decisions by the United States Supreme Court.

DEATH PENALTY

Age of Defendant

The defendant in Thompson v. Oklahoma, 108 S.Ct. 2687 (1988), was 15 years old when he participated in a brutal murder. The prosecution's motion to have Thompson tried as an adult rather than as a juvenile was granted. He was convicted of first-degree murder and sentenced to death. The U.S. Supreme Court ruled that the imposition of the death penalty for a crime committed by a 15-year-old child violated the Eighth Amendment prohibition against cruel and unusual punishment.

The plurality commenced its analysis by observing that the drafters of the Eighth Amendment made no attempt to define what constituted cruel and unusual punishment. Consequently, the Court has made that determination guided by the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). In this context, the Court has looked to legislative enactments, sentencing jury determinations, and the reasons underlying such laws and decisions.

The plurality first considered the legislative treatment of 15-year-old children. No state permits children of that age to vote or serve on juries. In all but one state a 15-year-old may not drive without parental consent. Similarly, in all but four states, a 15-year-old cannot marry without parental consent. Most importantly, all states designate the maximum age for juvenile court jurisdiction at not less than 16. "All of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult." 108 S.Ct. at 2693. Most states have not set a minimum age for the imposition of the death penalty. However, of the 18 states that have set a minimum age, all require that the defendant have attained the age of 16 at the time of the offense.

Next the plurality reviewed jury behavior. The best evidence indicates that between 18 and 20 children under 16 have been executed in this century. Significantly, none had been executed since 1948. The plurality believed that this forty-year moratorium was important. "The road we have traveled during the past four decades — in which thousands of juries have tried murder cases — leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community." *Id.* at 2697.

Finally, the plurality examined the reasons underlying the differential treatment of children. "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.* at 2699. Given these factors, retribution and deterrence, the underlying rationales for the death penalty, do not apply. The child is less culpable, and he is less likely to be deterred. Accordingly, the plurality found the death penalty violative of the Eighth Amendment. The plurality, however, limited its decision to children under 16.

The decisive vote was cast by Justice O'Connor, who wrote a separate concurring opinion. Justice O'Connor agreed in the judgment but on narrower grounds. The constitutional violation, in her view, was the legislature's failure to specify a minimum age: "In this unique situation, I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." *Id.* at 4904.

Jury Selection

Ross v. Oklahoma, 108 S.Ct. 2273 (1988), concerned the jury selection process in a capital murder case. By statute, each side had nine peremptory challenges. Twelve jurors were initially selected and examined by the court and counsel. If a juror was excused for cause,

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another was called and examined. After 12 jurors had been provisionally seated, the parties exercised their peremptory challenges alternately. The prosecutor went first. When a juror was struck, a replacement was called and examined. Once the replacement was provisionally seated, the strikes would continue until all the peremptory challenges had been used or waived.

Darrell Huling was a replacement for the juror excused due to the defense's exercise of its fifth peremptory. During examination, he stated that he would automatically impose the death penalty if the defendant were found guilty. The defense moved to challenge him for cause. When the motion was denied, the defense used a peremptory challenge to have him removed. The proceedings continued until the defense had used all of its peremptory challenges. Ross was subsequently convicted and sentenced to death. He argued that the trial court's failure to strike Huling violated his right to an impartial jury and due process.

On review, the Supreme Court disagreed. There was no dispute that the trial court had committed an error in not striking Huling. Had Huling remained on the jury, Ross's right to an impartial jury would have been violated. Huling, however, was not on the jury. He was removed with a peremptory challenge. Moreover, none of the 12 jurors who sat were challenged for cause, nor did Ross ever suggest that any of them was not impartial.

Ross's argument focused on the fact that had he not had to use his peremptory challenge on Huling, he might have struck one of the other jurors. Thus, the jury panel would have been different. The Court simply did not believe that this difference was significant.

> [W]e reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension . . . They are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated. *Id.* at 2278.

Right to Counsel

Satterwhite v. Texas, 108 S.Ct. 1792 (1988), involved the violation of the right to counsel in a capital sentencing hearing. Satterwhite was indicted for a murder committed during a robbery. Counsel was appointed thereafter. Unknown to counsel, a psychiatrist interviewed Satterwhite in order to determine his competency to stand trial, his insanity at the time of the offense, and his future dangerousness. The latter is an aggravating circumstance under the Texas death penalty law. After conviction, the psychiatrist testified at the sentencing hearing that Satterwhite presented a continuing threat to society through acts of criminal violence.

The Supreme Court ruled that the psychiatric interview was unconstitutional under Estelle v. Smith, 451 U.S. 454 (1981), in which the Court had held that defendants formally charged with capital crimes have a Sixth Amendment right to counsel before submitting to psychiatric examinations designed to determine their future dangerousness.

Next, the Court considered whether this violation constituted harmless error. Some constitutional errors cast so much doubt on the fairness of the process that they can never be considered harmless. For example, Sixth Amendment violations that pervade the entire proceeding fall within this category. Thus, in Holloway v. Arkansas, 435 U.S. 475 (1978), the Court wrote: "[W]hen a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital case, reversal is automatic." *Id.* at 489. A different analysis, however, controls when a right to counsel violation is limited to the erroneous admission of particular evidence. Hence, confessions and line-ups conducted in violation of the Sixth Amendment are subject to harmless error analysis. *See* Milton v. Wainwright, 407 U.S. 371 (1972); Moore v. Illinois, 434 U.S. 220 (1977). According to the Court, these latter cases governed.

In applying the harmless error rule, however, the Court could not conclude that the error was harmless beyond a reasonable doubt. The psychiatrist was the only licensed physician to testify at the sentencing hearing and his opinion was devastating: Satterwhite was "beyond the reach of psychiatric rehabilitation." Consequently, the judgment was reversed.

Aggravating Circumstance - Prior Conviction

The defendant in Johnson v. Mississippi, 108 S.Ct. 1981 (1988), was convicted of murder and sentenced to death. Three aggravating circumstances provided the basis for the sentence. One of these concerned a prior felony involving the use or threat of violence to another. In Johnson's case a 1963 New York conviction for the crime of second-degree assault with intent to commit rape was introduced. After the Mississippi conviction, Johnson's attorneys successfully challenged the 1963 conviction in the New York courts. They then moved to vacate the Mississippi death sentence because it had been based on an invalid New York conviction. The Mississippi Supreme Court rejected the motion.

On review, the U.S. Supreme Court reversed. The Court held that an invalid conviction meant that Johnson should be presumed innocent, unless and until he was retried and convicted. Since only the record of conviction was admitted in the sentencing hearing, the State could not argue that the underlying conduct was sufficient to uphold the death penalty. In support of its decision, the Court cited two aspects of its Eighth Amendment jurisprudence as relevant to Johnson's situation. First, the Court wrote: "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Id.* at 1986 (quoting Gardner v. Florida, 430 U.S. 349, 363-64 (1977). Second, the Court had made clear that death penalty decisions could not be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." *Id.* (quoting Zant v. Stephens, 462 U.S. 862, 884-85 (1983).

Aggravating Circumstances - Vagueness

The defendant in Maynard v. Cartwright, 108 S.Ct. 1853 (1988), was convicted of first-degree murder and

sentenced to death. The jury found two aggravating circumstances: the defendant knowingly created a great risk of death to more than one person, and the murder was "especially heinous, atrocious, or cruel." Cartwright challenged the second aggravating circumstances, arguing that it was unconstitutionally vague. The Tenth Circuit had upheld that argument and the Supreme Court affirmed.

The Court initially distinguished vagueness issues under the Due Process Clause and the Eighth Amendment. Vagueness questions under Due Process are based on a lack of notice and can be overcome in any case where reasonable persons would know that their conduct was at risk. Unless First Amendment interests are implicated, a criminal statute is judged for vagueness on an "as-applied" basis.

The Eighth Amendment analysis is derived from Furman v. Georgia, 408 U.S. 238 (1972), where the Court struck down the death penalty as arbitrary and capricious because it provided no principled way to distinguish those that received the death penalty from those who did not. As the Court remarked: "Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 108 S.Ct. at 1858. Applying this standard in Godfrey v. Georgia, 446 U.S. 420 (1980), the Court struck down a death sentence based on an aggravating circumstance that the killing was "outrageously or wantonly vile, horrible or inhuman." According to the Court, the vague construction of these words provided "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.* at 433. Similarly, the aggravating circumstance in *Cartwright* — "especially heinous, atrocious, or cruel" — gave no more guidance and thus violated Eighth Amendment requirements.

Mitigating Circumstances

Ralph Mills was convicted of the first-degree murder of his cellmate and sentenced to death. In Mills v. Maryland, 108 S.Ct. 1860 (1988), he successfully challenged that sentence.

After determining guilt, the jury found an aggravating circumstance — namely, that Mills committed murder while confined in a correctional institution. The jury was then to consider mitigating circumstances, after which it was to balance the aggravating circumstances against the mitigating circumstances in determining whether the death penalty was appropriate. The defense offered evidence in mitigation: Mills' relative youth, his mental infirmity, his lack of future dangerousness, and the State's failure to make any meaningful effort to rehabilitate him while incarcerated. On the verdict form, the jury marked "no" beside each mitigating circumstance and returned the death penalty. Mills argued that jury instructions and the verdict form led the jury to believe that it had to agree unanimously to a mitigating circumstance before it could balance that circumstance against the aggravating circumstances. Thus, even if eleven jurors believe some mitigating circumstance or circumstances were present, they would mark "no" on the form and thereby be foreclosed from considering that factor.

On review, the U.S. Supreme Court reversed. The Court reaffirmed its earlier position concerning mitigating circumstances. "It is beyond dispute that in a capital case, the sentencer [may] not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " *Id.* at 1865 (quoting Eddings v. Oklahoma, 455 U.S. 104, 110 (1982)). In Mills' view a single juror could not hold out because there must be unanimity before a mitigating factor could be considered. The critical issue was the jury's understanding of the instruction. In reviewing death sentences, the Court has required greater certainty that jury conclusions rested on proper grounds. In particular, if two interpretations of the instructions are possible and one interpretation is improper, the death sentence must be vacated.

> We conclude that there is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. Under our cases, the sentencer must be permitted to consider all mitigating evidence. *Id.* at 1870.

Jury Instructions

The defendant in Lowenfield v. Phelps, 108 S.Ct. 546 (1988), was convicted of 2 counts of manslaughter and 3 counts of first-degree murder. Thereafter, the jury began deliberating on the death sentence. The next day the foreman advised the court that the jurors were unable to reach a decision. The court polled the jury, asking whether each member believed that further deliberation would be helpful. Eight jurors answered in the affirmative, and the court sent the jury back to deliberate. A second note from the foreman indicated that some jurors misunderstood the poll. A second poll revealed that 11 jurors believed further deliberations would be advisable. The court then instructed the jury to consult and consider each other's views with the objective of reaching a verdict, but not to surrender their own honest beliefs. The jury returned 30 minutes later with a verdict sentencing the defendant to death on all three counts of first-degree murder. On appeal, the defendant argued that the polls and supplemental instruction coerced the jury into imposing the death penalty.

On review, the Court rejected this argument. The Court saw little difference between the supplemental charge and the traditional *Allen* charge. In Allen v. United States, 164 U.S. 492 (1896), the Court upheld a charge that urged minority members of a hung jury to consider the views of the majority and to ask themselves whether their own views were reasonable under the circumstances. The Court reaffirmed the *Allen* charge and pointed out that the instruction in *Lowenfield* was even less coercive because it was not directed at minority jurors. The Court also distinguished its decision in Jenkins v. United States, 380 U.S. 445 (1965). In that case the trial judge instructed the jury: "You have got to reach a decision in this case." *Id.* at 446. The Court found this statement to

be coercive. The instruction in *Lowenfield,* however, was different. It did not require the jurors to reach a decision. Moreover, the polling of the jury by the trial court was not prejudicial. The judge had not inquired into the numerical division of the jurors, which conduct was found to be coercive in Brasfield v. United States, 272 U.S. 448 (1926). Rather, the court inquired only about whether further deliberations would be helpful.

DISCOVERY

The defendant in Taylor v. Illinois, 108 S.Ct. 646 (1988), was convicted of attempted murder. Prior to trial, the prosecution filed a motion requesting a list of defense witnesses pursuant to the state discovery rules. In response, the defense identified four witnesses. The defense amended its list on the first day of trial, adding two more names. On the second day of trial, after the prosecution's two principal witnesses had testified, the defense attorney made an oral motion to add other witnesses. Counsel stated that he had just been informed about the witnesses and had not been able to locate any of them previously. During a subsequent hearing on this motion, one of the witnesses testified that counsel had visited his home a week before the trial. This testimony contradicted defense counsel's representations to the trial court. The court excluded the witness's testimony because counsel's conduct constituted a "blatant violation of the discovery rules." Taylor argued that the imposition of this sanction violated his right to compulsory process.

On review, the Supreme Court upheld the trial court's ruling. The Court's opinion, however, contained limiting language. First, the Court rejected the State's argument that the Compulsory Process Clause implicated only the right to subpoena witnesses. The Court rejected this narrow interpretation of the Clause:

> The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment even though it is not expressly described in so many words. *Id.* at 652.

The right to present defense evidence, however, is not absolute. It is limited by the State's interest in the orderly conduct of a criminal trial, including the enforcement of discovery sanctions. While the Court acknowledged that preclusion of evidence was a drastic remedy, it was not willing to forbid its use in the appropriate case. In the Court's view, other sanctions would be less effective. The trial court may insist on an explanation when a party fails to comply with a discovery order.

> If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Confrontation Clause simply to exclude the witness' testimony. *Id.* at 655-56.

The Court also found the sanction appropriate in this case. The trial court found a willful and blatant violation, a finding that was supported by the record. Finally, the Court saw nothing wrong with holding the client responsible for his counsel's conduct; clients often must accept the consequences of their attorney's tactical decisions.

"OTHER ACTS" EVIDENCE

The defendant in Huddleston v. United States, 108 S.Ct. 1496 (1988), was charged with possessing and selling stolen goods (video cassette tapes) in interstate commerce. There was no dispute that the tapes were stolen; the only issue was whether Huddleston knew that they were stolen. To prove knowledge, the prosecution offered evidence of "other acts" under Federal Evidence Rule 404(b), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

One "other act" involved Huddleston's selling of television sets for very low prices. A second "other act" involved the selling of kitchen appliances for $8000 when the actual cost was $20,000. These appliances had been stolen. Huddleston claimed that he sold all these items for Leroy Wesby on a commission basis and that he did not know that they were stolen.

On appeal, Huddleston argued that the probative value of the television sales depended on their "stolen" character and that the prosecution never established that the televisions were in fact stolen. The admissibility issue depended on the proper standard of proof, an issue on which the circuit courts had divided. Some courts had concluded that the prosecution must prove the "other act" by a "preponderance of evidence." Others had ruled that a "clear and convincing evidence" standard must be satisfied. Still others had held that the trial judge's decision was limited to determining whether sufficient evidence from which a jury could find the existence of the other act was the applicable standard.

On review, the Supreme Court adopted the last position. Based on Evidence Rule 104(b), this is, in effect, a prima facie evidence standard. The Court explained:

> In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact [stolen TVs] by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—here, that the televisions were stolen—by a preponderance of the evidence. *Id.* at 1501.

According to the Court, the large quantity, the low price, the lack of a bill of sale, and the sale of other stolen merchandise satisfied this standard.

ENTRAPMENT

Matthews v. United States, 108 S.Ct. 883 (1988), involved the entrapment defense. Employed by the Small Business Administration, Matthews was charged with accepting a bribe. He was arrested when he took money from a participant in a S.B.A. program. He sought to raise an entrapment defense because the participant was

working with the F.B.I. at the time of the payment. The district court, however, refused to instruct on entrapment because Matthews would not admit committing all the elements of the crime, in particular the mens rea element. Matthews claimed the money was a personal loan unrelated to S.B.A. business.

On review, the Supreme Court upheld Matthew's view; denying the charge and asserting the affirmative defense of entrapment is permissible. Under federal law, entrapment has two elements: government inducement of the crime, and lack of predisposition on the part of the defendant to engage in criminal conduct. *See* Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932). The prosecution argued that entrapment presupposed the commission of the crime and a jury could not logically conclude that Matthews had both failed to commit the crime and been entrapped. The Court, however, saw nothing unusual about pleading inconsistent defenses. For example, in Stevenson v. United States, 162 U.S. 313 (1896), the Court had held that a murder defendant was entitled to both a manslaughter and self-defense instruction: "The affirmative defense of self-defense is, of course, inconsistent with the claim that the defendant killed in the heat of passion." 108 S.Ct. at 887.

Two points about *Matthews* are noteworthy. The entrapment defense is not constitutionally based, and thus the case affects only federal prosecutions. In addition, Chief Justice Rehnquist wrote the opinion. A Rehnquist opinion that favors a criminal defendant is a rather unique event.

SPEEDY TRIAL

United States v. Taylor, 108 S.Ct. 2413 (1988), involved the circumstances under which a district court could dismiss a case with prejudice as a remedy for a violation of the Speedy Trial Act of 1974. Taylor was indicted for conspiracy to distribute cocaine and possession of cocaine with intent to distribute. His case was scheduled for trial the day prior to the expiration of the 70-day period within which the Act requires the prosecution to bring an indicted defendant to trial. Taylor, however, failed to appear and a bench warrant was issued. He was subsequently arrested on state charges that were later dismissed. Commencement of his federal trial was delayed for a number of reasons, including his appearance as a defense witness in another case and slow processing by the Government. A superseding indictment, adding a failure-to-appear charge, was eventually returned.

Taylor then moved to dismiss on speedy trial grounds. The district court ruled that some of the delay was reasonable and thus excludable in computing the 70-day period. Fourteen days of delay, however, were due to the Government's "lackadaisical behavior" and resulted in a violation of the Act. Accordingly, the court dismissed the original counts with prejudice to reprosecution.

On review, the Supreme Court reversed. The issue before the Court was whether the district court had abused its discretion in dismissing with prejudice. Section 3162(a)(2) provides: "In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." In addition, the legislative history indicates that prejudice to the defendant is a relevant factor. Unfortunately, the district court failed to specify how it evaluated these factors. In particular, the defendant's conduct in failing to appear for trial was apparently not considered. The Court wrote:

> The court did not explain how it factored in the seriousness of the offenses with which respondent stood charged. The District Court relied heavily on its unexplained characterization of the Government conduct as "lackadaisical," while failing to consider other relevant facts and circumstances leading to dismissal. Seemingly ignored were the brevity of the delay and the consequential lack of prejudice to respondent, as well as respondent's own illicit contribution to the delay.
>
> At bottom, the District Court appears to have decided to dismiss with prejudice in this case in order to send a strong message to the Government that unexcused delays will not be tolerated. That factor alone, by definition implicated in almost every Speedy Trial Act case, does not suffice to justify barring reprosecution in light of all the other circumstances present. *Id.* at 2423.

GRAND JURY

Bank of Nova Scotia v. United States, 108 S.Ct. 2373 (1988), involved a 20-month grand jury investigation, which resulted in the indictment of eight defendants on 27 counts, including conspiracy, mail fraud, and tax fraud. The district court dismissed the indictments for prosecutorial misconduct.

> The District Court found that the Government had violated Federal Rule Criminal Procedure 6(e) by: (1) disclosing grand jury materials to Internal Revenue Service employees having civil tax enforcement responsibilities; (2) failing to give the court prompt notice of such disclosures; (3) disclosing to potential witnesses the names of targets of the investigation; and (4) instructing two grand jury witnesses, who had represented some of the defendants in a separate investigation of the same tax shelters, that they were not to reveal the substance of their testimony or that they had testified before the grand jury. The court also found that the Government had violated Federal Rule of Criminal Procedure 6(d) in allowing joint appearances by IRS agents before the grand jury for the purpose of reading transcripts to the jurors. The District Court further concluded that one of the prosecutors improperly argued with an expert witness during a recess of the grand jury after the witness gave testimony adverse to the Government. It also held that the Government had violated the witness immunity statute. . . , by the use of "pocket immunity" (immunity granted on representation of the prosecutor rather than by order of a judge), and that the Government caused IRS agents to mischaracterize testimony given in prior proceedings. Furthermore, the District Court found that the Government violated the Fifth Amendment by calling a number of witnesses for the sole purpose of having them assert their privilege against

self-incrimination and that it had violated the Sixth Amendment by conducting postindictment interviews of several high-level employees of The Bank of Nova Scotia. Finally, the court concluded that the Government had caused IRS agents to be sworn as agents of the grand jury, thereby elevating their credibility. *Id.* at 2375-76.

When the case reached the Supreme Court, however, the Court reversed. Initially, the Court ruled that "as a general matter, a District Court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." *Id.* at 2373. The Court based its ruling on its reading of Rule 52(a), which requires a harmless error analysis: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." In this context, "dismissal of an indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Id.* at 2374 (quoting United States v. Mechanik, 475 U.S. 66, 78 (1986)(O'Connor, J., concurring). The Court recognized, however, that some violations require automatic reversal without a harmless error inquiry. For example, racial discrimination in the selection of grand jurors, Vasquez v. Hillery, 474 U.S. 254 (1986), and the exclusion of women, Ballard v. United States, 329 U.S. 187 (1946), require automatic dismissal. Those violations, however, were constitutional and a harmless error analysis would have required unguided speculation.

Here, the Court found no constitutional violation. The Sixth Amendment postindictment violations (interviews with Bank officials) occurred after the grand jury had handed down the indictments. In addition, the Court found no Fifth Amendment violation. The prosecution was not required to accept a witness' claim of the privilege before testifying; the witnesses could be called and forced to claim the privilege under oath, so long as questioning ceased once the privilege was claimed.

According to the Court, many of the Rule 6 violations did not affect the grand jury's decision. The use of the grand jury to gather evidence in civil audits, the violation of the secrecy provisions by publicly identifying targets, and the imposed secrecy requirements on witnesses all fell into this category.

A detailed analysis of other types of violations led the Court to the same result. Swearing IRS agents as "agents" of the grand jury did not mislead the jurors because the record showed that the prosecutors treated them as their own witnesses, a fact that the jurors understood. Moreover, the presentation of inaccurate summaries by the IRS agents is not a ground for dismissal. An indictment valid on its face cannot be attached on the ground that it is based on unreliable or incompetent evidence. Costello v. United States, 350 U.S. 359 (1956). Although the prosecutors may have had doubts about the summaries, the record did not support a finding that they knew the summaries were false. Moreover, the Government conceded that the treatment of the tax expert was improper, but the expert testified that this conduct had not affected his testimony. The Court declined to decide whether the use of "pocket immunity" was proper. Instead, the Court ruled that this procedure did not affect the grand jury decision. The jurors knew that these witnesses had made a deal with the Government and that was the relevant consideration. Other errors cited by the District Court were treated in the same fashion. None, in the Court's view, affected the grand jury's determination.

Finally, the Court noted the availability of other less drastic remedies for such alleged violations. These include contempt, disciplinary sanctions, and public censure. "Such remedies allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant." 108 S.Ct. at 2378.